

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,

Plaintiff,

VS.

RADHELL L. ROTH,

Defendant.

CASE NO. 8:05CR75

TENTATIVE FINDINGS

The Court has received the Revised Presentence Investigation Report (“PSR”) and the Defendant’s objections thereto (Filing No. 74). See Order on Sentencing Schedule, ¶ 6. The Court advises the parties that these Tentative Findings are issued with the understanding that, pursuant to *United States v. Booker*, 2005 WL 50108 (U.S. Jan. 12, 2005), the sentencing guidelines are advisory.

The Defendant objects to the PSR because it does not include a downward adjustment for the safety valve. However, as explained by the probation officer, U.S.S.G. § 2D1.11, as opposed to § 2D1.1, applies to the count of conviction charging an offense under 21 U.S.C. § 841(c)(2). While U.S.S.G. § 2D1.1 allows for a safety valve reduction, § 2D1.11 does not. *United States v. Anton*, 380 F.3d 333, 335 (8th Cir. 2004) (concluding that the safety valve did not apply to § 2D1.11, used in the situation involving a charge pursuant to § 841(c)(2)). Therefore, the objection is denied.

IT IS ORDERED:

1. The Court's tentative findings are that the Defendant's Objections to the Presentence Investigation Report (Filing No. 74) are denied;

2. Otherwise the Court's tentative findings are that the Presentence Investigation Report is correct in all respects;

3. If **any** party wishes to challenge these tentative findings, the party shall immediately file in the court file and serve upon opposing counsel and the Court a motion challenging these tentative findings, supported by (a) such evidentiary materials as are required (giving due regard to the requirements of the local rules of practice respecting the submission of evidentiary materials), (b) a brief as to the law, and (c) if an evidentiary hearing is requested, a statement describing why an evidentiary hearing is necessary and an estimated length of time for the hearing;

4. Absent submission of the information required by paragraph 3 of this Order, my tentative findings may become final; and

5. Unless otherwise ordered, any motion challenging these tentative findings shall be resolved at sentencing.

DATED this 15th day of September, 2005.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge